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No. 81-330

IN THE

Supreme Court of the United States

October Term, 1981

UNITED ENGINEERS & CONSTRUCTORS INC.,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
and RAYMOND WILLIAMS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Did not the courts below err in ruling that the contractors were vicariously liable for the Union's discriminatory referrals from the hiring hall, regardless of whether they knew or had reason to know of the Union's discrimination?

2. Did not the courts below adopt an erroneous construction of 42 U. S. C. § 1981, when they held the contractors liable for race discrimination under that statute despite the district court's finding that the plaintiffs had failed to prove intent by the contractors to discriminate?

3. Did not the courts below err in permitting the action to proceed as a defendant class action and in holding approximately 1400 contractors in the defendant class injunctively liable to plaintiffs for race discrimination, without considering either the contractors' individual minority utilization statistics or their individual defenses?

4. Did not the courts below err in asserting personal jurisdiction over the contractors in the defendant class, who had neither been named as parties in the complaint nor served with process?

5. Did not the courts below err in permitting the action to proceed as a defendant class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure, thereby denying the defendant class members the right to opt out of the class?

PARTIES IN THE COURT OF APPEALS

The parties in the Court of Appeals were (1) the Commonwealth of Pennsylvania (a plaintiff below and respondent in this Court); (2) twelve individuals—Raymond Williams, Willie McKay, Marion J. Eaddy, Randolph Hughes, Jr., Arel Brownlee, William Bostic, Kenneth Howard, Alpha Christmas, Ronald Richardson, Clarence Winder, Ronald Crawford and Frank Gilchrist (the individually named plaintiffs below and respondents in this Court); (3) Local Union 542, International Union of Operating Engineers (a named defendant below); (4) Operating Engineers Joint Apprenticeship and Training Committee of Philadelphia, Eastern Pennsylvania and the State of Delaware (a named defendant below); (5) four contractor associations—General Building Contractors Association, Inc., Contractors Association of Eastern Pennsylvania, Pennsylvania Excavating Contractors Association, and United Contractors Association (all of which were named defendants below and three of which are filing separate petitions with this Court); (6) Glasgow, Inc. (a named defendant below and a separate petitioner to this Court); (7) Bechtel Power Corporation (a nonparty member of the defendant class and a separate petitioner to this Court); and (8) United Engineers & Constructors Inc. (a nonparty member of the defendant class and petitioner herein).

In addition, the proceedings below involved a plaintiff class estimated to have more than 1,000 members and a defendant class estimated to have approximately 1,400 members. Petitioner herein knows only a small fraction of the identities of the individual members of the plaintiff and defendant classes.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

United Engineers & Constructors Inc. ("United") petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, entered on May 19, 1981.[1]

1. Pursuant to Supreme Court Rule 28.1, United Engineers & Constructors Inc. states that it is a wholly-owned subsidiary of Raytheon Company, a publicly-owned corporation.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania finding petitioner and the other class and named defendants liable (JA. 9-211) [2] has been officially reported at 469 F. Supp. 329. The opinion of the United States Court of Appeals for the Third Circuit (JA. 8), which affirmed the judgment of the District Court with respect to the contractors' appeals by an evenly divided court, has been officially reported at 648 F. 2d 923.

JURISDICTION

The judgment of the Court of Appeals was entered on May 19, 1981 (JA. 3). The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

The following statute and rules are involved in the consideration of the instant petition. The pertinent text of each is set forth in the Supplemental Appendix appearing at the end of this petition:

Civil Rights Act of 1866:
42 U. S. C. § 1981
Federal Rules of Civil Procedure:
Rule 23(a)
Rule 23(b)(2)
Rule 23(b)(3)
Rule 23(c)(2)

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2. References herein to the appendix are "JA.," followed by the page number. The appendix has been separately printed in order to serve as a joint appendix not only to this Petition but also to the related petitions filed by Bechtel Power Corporation, Glasgow, Inc., and two of the three contractor associations which are filing petitions. The text of the statutory provision and rules relied on is appended to the end of this Petition as a Supplemental Appendix, designated herein as "SA."

STATEMENT OF THE CASE

This petition seeks review of an *in banc* decision by an evenly divided United States Court of Appeals for the Third Circuit (JA. 8), which affirmed a District Court decision (JA. 9-212) that had held 1,400 contractors in a defendant class "injunctively liable" for the racially discriminatory referral practices of a union hiring hall.[3] The decisions of those two courts have far-reaching ramifications for the construction industry and for all other industries where hiring halls are widely used, and conflict with other federal court decisions on such questions as (1) contractor liability for discrimination by a union, (2) the need to prove underutilization of minorities by each contractor held liable, and (3) the proper role of defendant class actions.

Without finding any discriminatory actions or intent on the part of the contractors in the defendant class, the District Court issued an injunction (JA. 228-52, 308-21) requiring all 1,400 of those contractors to meet ambitious minority utilization goals regardless of the availability of skilled minority operating engineers (JA. 234-35, 308), to provide on-the-job training to minorities (JA. 247) even though the contractors were not found to have provided any training to whites, and to prepare and furnish regular monthly reports to a reporting committee (JA. 248, 314-15). Subsequent rulings also held the named defendants liable for substantial costs of implementing various aspects of the injunctive order and granted the named contractor and contractor association defendants a right of contribution against the defendant class members for those

3. The Court of Appeals also unanimously affirmed the District Court's finding that Local 542 of the International Union of Operating Engineers ("the Union" or "Local 542") had engaged in a pattern and practice of racial discrimination. This petition does not seek review of the findings with respect to the Union.

costs. *See* **Commonwealth of Pennsylvania v. Local 542, 507 F. Supp. 1146, 1158-59 (E. D. Pa. 1980).**

The lower courts' rulings with respect to the contractors are extraordinary for several reasons. First, there was no finding that the contractors held liable had themselves discriminated against minorities. Rather, the contractors were held *vicariously* liable for the *Union's* discriminatory practices in referring employees to them from the Union hiring hall (JA. 195-96). Second, none of the 1,400 defendant class members who were held liable and were burdened by the injunction had been named as a defendant in the complaint or served with process. Third, the courts below reached their conclusions despite the absence of any proof of the contractors' individual minority utilization statistics. Indeed, the District Court expressly determined that the employers could be held liable regardless of their individual employment statistics (JA. 195). It also denied a motion for summary judgment filed by one contractor (Barger, Inc.) and subjected that contractor to the same injunctive order imposed on all other contractors, despite the uncontradicted evidence that at least *50%* of Barger's operating engineers were black. Finally, the contractors were held liable regardless of whether they knew or had reason to know of the Union's discrimination, since the District Court ruled that such knowledge was irrelevant (JA. 128, 168, 195).

REASONS FOR GRANTING THE WRIT

I. This Case Involves Questions of Great Importance, Because of Its Extraordinary Impact on the Construction Industry and on Employers in All Other Industries Where Hiring Halls Are Widely Used.

Federal labor law expressly approves and encourages the use of union hiring halls by employers as a source of securing workers. In **Local 357, International Brotherhood of Teamsters v. NLRB,** 365 U. S. 667 (1961), this Court observed that hiring halls serve as a means "to eliminate wasteful, time-consuming, and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers," *id.* at 672, and held that facially neutral hiring hall agreements (such as the one in the case at bar) are lawful under the National Labor Relations Act. Following this Court's decision in **Local 357,** a body of labor law developed which has assisted labor unions in their efforts to persuade employers to agree to and comply with hiring hall provisions. A nondiscriminatory union-operated hiring hall provision is a mandatory subject for collective bargaining,[4] and, even if the union does engage in discrimination, that fact does not justify an employer's conduct in refusing to bargain with the union.[5]

The decisions in the case at bar, however, seriously undermine the utility of hiring halls, impose strong conflicting obligations on employers, and create enormous uncertainty in industries where hiring halls are widely

4. **Houston Chapter, Associated General Contractors,** 143 NLRB 409 (1963), *enf'd,* 349 F. 2d 449 (5th Cir. 1965), *cert. denied,* 382 U. S. 1026 (1966).

5. **R. C. Cobb, Inc.,** 231 NLRB 99 (1977); **Bell & Howell Co.,** 230 NLRB 420 (1977), *aff'd,* 598 F. 2d 136 (D. C. Cir. 1979).

used. By imposing strict liability on the contractors regardless of whether they knew or had reason to know of the Union's discriminatory referral practices, the decisions below leave employers no choice but to refrain from resorting to *any* hiring hall and to risk a strike by resisting, to the point of impasse, union demands for hiring hall provisions.

No other course of action will be available to the employers realistically. They have no practical means of exercising control over the hiring hall,[6] and in any event any attempt to exercise such control would run the serious risk of being held an unfair labor practice.[7] Furthermore, contractors cannot be expected to prevent, or attempt to prevent, discriminatory practices of which they neither are aware nor have any reason to be aware. Finally, employers with exclusive hiring hall contracts (as in the case at bar) cannot hire minorities outside the hiring hall, since to do so would constitute a breach of the collective bargaining agreement, resulting either in a strike shutting down the entire construction site or a damage action under section 301 of the Labor Management Relations Act, 29 U. S. C. § 185. Even assuming, *arguendo,* that the union's acts of discrimination would constitute a defense to a breach of contract action, each contractor would have to

6. The record shows that referrals were supposed to be made from out-of-work lists which were in the exclusive possession of the Union. Thus, the contractors would have no way of knowing whether those lists were being followed.

7. Sections 8(a)(1) and 8(a)(2) of the NLRA, respectively, prohibit employer interference with or restraint of employees in the exercise of their Section 7 rights, and employer domination of or interference with the administration of any labor organization. *See* **Lummus Co. v. NLRB,** 339 F. 2d 728, 735 (D. C. Cir. 1964) ("The basic thesis for the whole of modern thought in this area is that the representative of the employees is not, cannot be, and must not be under the complete control of the employer").

defend such an action by going through the same laborious process plaintiffs went through in order to prove discrimination by the Union in this case,[8] with the additional danger of being held liable for damages should they fail to prove that the Union discriminated.

The obvious inadequacy of these alternatives leaves only one option open to the contractors—resistance to a union's demand for a hiring hall provision. Resistance to such a demand, however, can only lead to increased labor strife. That fact is graphically illustrated by the case at bar, where Local 542 struck for ten weeks in 1961 and again in 1963 precisely for the purpose of forcing the present exclusive hiring hall system on the contractors (JA. 23). Thus, by making it imperative for employers to resist union hiring hall demands, the decisions below create a substantially increased risk of work stoppages and thereby conflict with a major goal of federal labor policy, encouragement of the peaceful resolution of labor disputes. *See, e.g.*, **Boys Markets Inc. v. Retail Clerks Union, Local 770,** 398 U. S. 235, 251 (1970) ("As labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes").

The impact on federal labor policy of the decisions of the courts below is accentuated by the fact that this action was brought as a bilateral class action. Thus, these decisions not only have significant precedential effect on industries throughout the United States where hiring halls

8. The lawsuit in the case was filed in November, 1971. Trial commenced on January 19, 1976, and was not concluded until June 28, 1977. The District Court released its findings of fact and conclusions of law on January 2, 1979 and issued its Judgment and Decree on November 7, 1979.

are used, but they have a direct effect on the 1,400 contractors in the defendant class. All 1,400 contractors—none of which was found to have discriminated itself against minorities, to have had an underutilization of minorities on its workforce, or to have had knowledge or even reason to know of the Union's discriminatory practices—have been burdened with a sweeping injunction, which imposes ambitious minority utilization goals and training obligations on them. Never before have employers (the greatest number ever sued under the federal anti-discrimination laws in a single lawsuit) been found liable and ordered to undertake costly affirmative action without ever being named as defendants, being served with process, or having their individual minority utilization statistics and defenses considered.

In short, there can be no doubt as to the importance of this case, not only for the 1,400 contractors held liable, but for the stability of labor-management relations in all industries where hiring halls are used. The Court of Appeals recognized the importance of this case by scheduling it for *in banc* consideration. However, because the Court of Appeals divided evenly, it issued no opinion. The Court of Appeals' failure to issue any opinion has only added to the uncertainty created in the construction industry by the District Court's rulings. This is a case which cries out for clarification of the applicable legal principles.

II. This Court Should Grant Certiorari Because the Decisions Below Conflict With Decisions of Other Lower Federal Courts on the Question of the Employers' Liability.

In reaching its decision, the District Court in the case at bar discussed four lines of precedents—(1) cases arising under the National Labor Relations Act ("NLRA") in which it was sought to hold employers liable for discrimi-

nation by a union hiring hall against non-union members; (2) cases arising under Title VII of the 1964 Civil Rights Act in which it was sought to hold employers liable for racial discrimination by union hiring halls; (3) cases holding employers liable for racial discrimination under the "disparate impact" theory; and (4) civil rights cases applying the doctrine of *respondeat superior*. *See* A. 169. In each of these lines of precedent, there were conflicting authorities, and the District Court adopted a view contrary to that held by the majority of decisions.

A. NLRA Hiring Hall Cases.

In imposing vicarious liability on the contractors, the District Court relied heavily on what it perceived to be a *per se* rule of liability expressed by **Morrison-Knudsen Co., Inc. v. NLRB**, 275 F. 2d 914, 917 (2d Cir. 1960), *cert. denied*, 366 U. S. 909 (1961), which the District Court construed as imposing vicarious liability on an employer under the NLRA regardless of whether the employer knew or should have known of the union's discriminatory referral practices.

The District Court acknowledged that "*Morrison-Knudsen's* expression of a vicarious liability rule has not been followed by all courts of appeals" (JA. 171). But even that is an understatement, since all courts of appeals (with the possible exception of **Morrison-Knudsen**)[9] have required proof of either (1) knowledge by the employer, *see, e.g.*, **Lummus Co. v. NLRB**, 339 F. 2d 728 (D. C. Cir. 1964) (absolving employer of liability because it did not know and could not reasonably have known the rea-

9. In United's opinion, **Morrison-Knudsen** in fact does not impose liability on an employer irrespective of whether it knew or had reason to know of a union's discrimination, because knowledge in fact was present, as the Fifth Circuit noted in **NLRB v. Master Stevedores Assoc.**, 418 F. 2d 140, 142 (5th Cir. 1969).

son why the charging party was not hired), and **NLRB v. Master Stevedores Association,** 418 F. 2d 140 (5th Cir 1969) (absolving employers of liability for lack of knowledge), or (2) involvement by the employer in the union's discriminatory acts, *see, e.g.,* **Fruin-Colnon Corp. v. NLRB,** 571 F. 2d 1017 (8th Cir. 1978) (employer liable because *it* laid off employees at union's request).

In the case at bar, the District Court adopted a strict liability *respondeat superior* analysis which is in direct conflict with the analysis by Courts of Appeals in the above cases. For this reason alone, this Court should grant certiorari.

B. The Employment Discrimination Hiring Hall Cases.

Although there are few hiring hall employment discrimination cases on point, the little authority that does exist (mostly at the district court level) is uniformly contrary to the decisions in the case at bar.

Three decisions adopted *per se* views of *non*-liability, in that they absolved employers or employer associations of liability without even considering whether such employers or associations knew or had reason to know of the union's discriminatory referral practices: **Vogler v. McCarty, Inc.,** 294 F. Supp. 368, 374-75 (E. D. La. 1968), *aff'd sub nom.* **Heat & Frost Insulators & Asbestos Workers v. Vogler,** 407 F. 2d 1047 (5th Cir. 1969); **Allen v. Pipefitters Local Union No. 208,** 46 F. R. D. 473 (D. Colo. 1972); **McFadden v. Baltimore Steamship Trade Association,** 8 BNA FEP Cases 391, 393 (D. Md. 1972).[10]

10. **McFadden** was cited with approval in **Byrd v. Local Union No. 24,** 375 F. Supp. 545 (D. Md. 1974), but was distinguished on the ground that in **Byrd,** unlike **McFadden,** the complaint alleged that the defendants had participated in the union's discriminatory referral practices "by knowingly accepting discriminatory referrals

The New York state Court of Appeals has adopted a knowledge or notice standard: **Gaynor v. Rockefeller,** 15 N. Y. 2d 120, 204 N. E. 2d 627, 632 (1965) ("In the absence of such knowledge or notice, the mere fact that an employer obtains his labor force by referral from a union would not render him chargeable with involvement in the union's discriminatory practices").

C. The Title VII Disparate Impact Cases.

The Title VII decisions which the District Court found most persuasive were cases imposing liability on both employers and unions because of discriminatory provisions in a collective bargaining agreement.[11] The District Court reasoned that these cases imposed a duty on employers "to be aware of potential discriminatory impact resulting from a [labor] agreement" (JA. 184) and "an 'affirma-

10. (Cont'd.)

and by requesting the referral of white union members" and that the union had discriminated "with the knowledge, approval, and active participation of the subcontractors." 375 F. Supp. at 556.

As the District Court noted in the case at bar (JA. 177), the district court decision in **Rios v. Enterprise Ass'n,** 400 F. Supp. 988 (S. D. N. Y. 1975), *aff'd in part and rev'd in part sub nom.* **EEOC v. Enterprise Ass'n,** 542 F. 2d 579 (2d Cir. 1976), *cert. denied,* 430 U. S. 911 (1977), did enter an injunction *against an employer association,* ordering it to undertake rather nebulous affirmative action. However, contrary to the suggestion of the District Court in the case at bar (JA. 177-179), the association in **Rios** did not appeal the injunction. Rather, the appeals were taken only by the union and by the plaintiffs.

11. **Myers v. Gilman Paper Corp.,** 544 F. 2d 837 (5th Cir.), *cert. dismissed,* 434 U. S. 801 (1977); **Carey v. Greyhound Bus Co.,** 500 F. 2d 1372 (5th Cir. 1974); **Johnson v. Goodyear Tire & Rubber Co.,** 491 F. 2d 1364 (5th Cir. 1974); and **Robinson v. Lorillard,** 444 F. 2d 791 (4th Cir.), *cert. dismissed,* 404 U. S. 1006 (1971). *See* JA. 182.

tive duty' to prevent discrimination" (JA. 186). Underlying the District Court's ruling was its conclusion that 42 U. S. C. § 1981, the only statute under which the contractors were held liable,[12] does not require proof of discriminatory intent (JA. 167, 183).

The District Court's construction of 42 U. S. C. § 1981 as permitting "impact" liability and imposing an "affirmative duty" to prevent discrimination is squarely in conflict with the views taken by virtually every court of appeals, which with near unanimity have held that proof of discriminatory intent is essential in a section 1981 claim. *See, e.g.*, **Guardians Association v. Civil Service Commission,** 633 F. 2d 232, 263-68 (2d Cir. 1980); **Craig v. County of Los Angeles,** 626 F. 2d 659 (9th Cir. 1980), *cert. denied,* 101 S. Ct. 1364 (1981); **Mescall v. Burrus,** 603 F. 2d 1266, 1269-71 (7th Cir. 1979); **Williams v. DeKalb County,** 525 F. 2d 2 (5th Cir. 1978); **Grigsby v. North Mississippi Medical Center, Inc.,** 586 F. 2d 457 (5th Cir. 1978); **Donnell v. General Motors Corp.,** 576 F. 2d 1292, 1300 (8th Cir. 1978). *Contra*: **Davis v. County of Los Angeles,** 566 F. 2d 1334 (9th Cir. 1977), *vacated on ground of mootness,* 440 U. S. 625 (1979).

On two occasions this Court has granted a petition for a writ of certiorari to determine whether 42 U. S. C. § 1981, or its companion provision—42 U. S. C. § 1982, permits imposition of liability under the disparate impact theory. In each instance, however, it decided the case on other grounds. **City of Memphis v. Green,** 49 U. S. L. W. 4389, 4397 (U. S. April 20, 1981) (White, J., concurring); **County of Los Angeles v. Davis,** 440 U. S. 625, 627 (1979). Obviously, the question of disparate impact liability under 42 U. S. C. § 1981 is a recurring and im-

12. The contractors were not sued under Title VII of the 1964 Civil Rights Act because they were never named as respondents in any charge of discrimination filed with the EEOC.

portant one. In view of the District Court's utilization of an "impact" and "affirmative duty" analysis, this case squarely calls into question the much-debated view as to the nature of the duty imposed by 42 U. S. C. § 1981.[13]

D. Respondeat Superior Cases

The District Court also relied on several cases which it construed as permitting imposition of *respondeat superior* liability in civil rights cases (JA. 186-91). The decisions at bar, however, ignored the critical element of right of control—a right which is a prerequisite to a finding of vicarious liability (*see, e.g.*, **Restatement (Second) of Agency,** §§ 1(1) and 14) but which was totally lacking in this case. As the Court of Appeals for the Fifth Circuit noted in **Lummus Co.,** *supra,* contractors cannot control a union hiring hall, since such control would be contrary to the elementary principle of labor law that "*the representative of the employees is not, cannot be, and must not be under the complete control of the employer.*" 339 F. 2d at 735 (emphasis added). In a similar context, the Court of Appeals for the Sixth Circuit has held that mere delegation of functions, without retention of a right of control, cannot make the delegator vicariously liable for the acts of the delegatee: **NLRB v. Local No. 64, Falls Cities District Council,** 497 F. 2d 1335 (6th Cir. 1974) (union not liable for discrimination by district council, to which union had delegated responsibility for is-

13. Indeed, even if the District Court correctly decided that Title VII standards were applicable to § 1981 cases, its analysis was inconsistent with this Court's construction of Title VII. Although Title VII permits a finding of liability under the disparate impact theory, it "does not require the employer to restructure his employment practices to maximize the number of minorities and women hired." **Texas Department of Community Affairs v. Burdine,** 101 S. Ct. 1089, 1097 (1981).

suing work permits). Finally, several decisions of this Court mandate a cautious approach in imposing vicarious liability: **Monell v. Department of Social Services,** 436 U. S. 658, 690-95 & n. 57 (1978) (holding that *respondeat superior* liability is unavailable in suits against municipalities under 42 U. S. C. § 1983), and **Carbon Fuel Co. v. United Mine Workers,** 444 U. S. 212 (1979) (international union cannot be held liable for an unauthorized strike by a local union).

By holding the contractors vicariously liable for the Union's discrimination under the principle of *respondeat superior* even though the contractors had no right to control the union hiring hall, the decisions below conflict with the above-cited cases.

III. The Decisions Below Conflict With Decisions of This Court and of Other Federal Courts in Finding the Contractors Liable for Race Discrimination Without Considering the Racial Composition of Their Individual Workforces.

In **International Brotherhood of Teamsters v. United States,** 431 U. S. 324 (1977), this Court held that, in order to find an employer liable to a plaintiff class in an employment discrimination case, the plaintiffs must "establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *Id.* at 336. This Court further held that "a court's finding of a pattern or practice justifies an award of prospective relief," such as "an injunctive order." *Id.* at 361.

Consistent with this Court's decision in **Teamsters,** numerous lower federal courts likewise have held that liability for racial discrimination depends on proof of discrimination in the selection of the workforce of the em-

ployer held liable. *See, e.g.*, **Townsend v. Nassau County Medical Center,** 558 F. 2d 117, 120 (2d Cir. 1977), *cert. denied,* 434 U. S. 1015 (1978) ("We do not believe that a statistic relating only to the general population, and not to the employment practices of the particular defendant, should be sufficient to raise such a presumption" of illegality); **EEOC v. Navajo Refining Co.,** 593 F. 2d 988, 992 (10th Cir. 1979); **Jarrell v. Eastern Airlines,** 430 F. Supp. 884, 892 (E. D. Va. 1977), *aff'd per curiam,* 577 F. 2d 869 (4th Cir. 1978); and **Jackson v. Curators of University,** 456 F. Supp. 879, 881 (E. D. Mo. 1978). Indeed, only a year ago, the Court of Appeals for the Third Circuit aligned itself with the foregoing decisions by holding that, regardless of whether a policy has a disparate impact on the community at large, an employer is not liable unless the impact is manifested in the employer's own workforce. **EEOC v. Greyhound Lines, Inc.,** 635 F. 2d 188, 192-93 (3d Cir. 1980).

In the case at bar, however, United (together with all 1,400 other contractors in the defendant class) was subjected to an injunctive order requiring it to award prospective relief to the plaintiff class members, *despite the fact that there was no finding of any pattern or practice of discrimination in the selection of United's workforce or any finding of an underutilization of minorities by United.* Indeed, as noted above, United's employment statistics were never even introduced into evidence, and another contractor (Barger, Inc.) with a workforce that was at least 50% minority was also held liable and bound by the injunction.

The District Court's finding of liability without regard to the contractors' individual minority utilization statistics was thus inconsistent with **Teamsters** and the other decisions cited above. While none of those decisions was a defendant class action, that fact is immaterial. What is

critical is that the courts in the case at bar contravened **Teamsters** by finding United and the other defendant class members liable and by imposing *individual* injunctive obligations upon them without making any finding that, with respect to each contractor held liable and enjoined, there had been discrimination in the selection of *its* workforce. That the action was a defendant class action did not obviate the need to make an analysis and findings with respect to each contractor before imposing mandatory affirmative action requirements upon such contractor. On the contrary, the need to make individual findings rendered a defendant class action improper. *See, e.g.*, **Kline v. Caldwell Banker & Co.**, 508 F. 2d 226, 233 (9th Cir. 1974), *cert. denied*, 421 U. S. 963 (1975).

IV. The Decisions Below Conflict With Decisions of This Court on the Question Whether Certification of a Defendant Class Confers Personal Jurisdiction Over the Defendant Class Members.

In **Zenith Radio Corp. v. Hazeltine Research, Inc.**, 395 U. S. 100, 110 (1969), this Court stated: "It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process." The foregoing rule applies even if the action is a defendant class action, as is evident from **Christopher v. Brusselback**, 302 U. S. 500 (1938). In **Christopher**, this Court rejected an attempt to hold all of a particular bank's shareholders (including those who had not been served with process) liable to the bank's creditors under Equity Rule 38, the precursor to Rule 23. Noting that the controlling statute imposed a personal obligation on the shareholders, this Court held that the suit did not adjudicate the rights of the absent class members, since only "a court having jurisdiction to render a judgment

against them in personam" could rule on their liability. 302 U. S. at 502. Furthermore, this Court noted that the purpose of Equity Rule 38 "was to prescribe the procedure in equity to be followed in cases within the jurisdiction of the federal courts and not to enlarge their jurisdiction." *Id.* at 505.

United acknowledges that this Court on several occasions has held that defendant class members may be "bound" by a decree issued in a proper defendant class action. However, a close reading of those decisions reveals that the Court merely held that a class decree may bar relitigation of common issues by the class members under the doctrine of *res judicata* [14] or may adjudicate class members' rights to property already within the jurisdiction of the court through what is essentially an *in rem* proceeding.[15] In the case at bar, the courts went far beyond this limited scope of defendant class actions, by holding defendant class members personally liable and by imposing costly affirmative obligations which each class member must meet individually. The decisions below are thus in conflict with this Court's decisions.

V. The Decisions Below Conflict With a Ruling of the United States Court of Appeals for the Fourth Circuit on the Propriety of a Rule 23(b)(2) Defendant Class Action.

The defendant class in this case was certified under Rule 23(b)(2) of the Federal Rules of Civil Procedure. Throughout this case United contended that, if a defendant class could have been certified at all, it should have been certified under subdivision (b)(3), so that the de-

14. **Hansberry v. Lee**, 311 U. S. 32 (1940); **Supreme Tribe of Ben-Hur v. Cauble**, 255 U. S. 356 (1921).

15. **Smith v. Swormstedt**, 57 U. S. 288 (1854).